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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. LUIS GUSTAVO AGUSTIN, Defendant and Appellant.	B206358 (Los Angeles County Super. Ct. No. BA258759)

APPEAL from a judgment of the Superior Court of Los Angeles County, Carol H. Rehm, Judge. Affirmed; remanded with directions.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, James William Bilderback, II and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Luis Gustavo Agustin appeals the trial court's decision to revoke his probation and to impose a previously suspended three-year sentence on his conviction for possession of cocaine base for sale. We affirm, but order a corrected abstract to be prepared.

FACTS

On June 16, 2004, Agustin pleaded guilty to one count of possession of cocaine base for sale. In accord with the negotiated disposition, the trial court sentenced Agustin to three years in state prison, suspended execution of sentence, and placed him on formal probation for three years subject to several conditions, including that he perform 20 days of work for CALTRANS, and keep the probation department advised of his residence at all times, and obey all orders of the probation department. The record suggests, but does not expressly show so, that the probation department ordered Agustin to report in on a monthly schedule.

Between June 2004 and July 2005, Agustin reported to the probation department 12 times, and made partial payment on his court-ordered restitution. On July 12, 2005, Agustin reported to the department, following which he did not report again at any time.

On November 4, 2005, Agustin filed a motion to withdraw his plea on the grounds that Agustin had been diagnosed as mildly mentally retarded in the mid-1990's, and that his attorney at his 2004 plea hearing had given him incorrect advice regarding the immigration consequences of his plea. Agustin's motion to withdraw his plea was supported by a declaration, dated November 3, 2005, from his immigration attorney, Valerie Curtis-Diop, who stated that Agustin was then in "immigration custody in Lancaster [and] facing imminent deportation" as a result of his conviction.

On July 14, 2006, the trial court found that the district attorney at Agustin's plea hearing had given Agustin an adequate warning about the immigration consequences of his plea, and that ineffectiveness of counsel in that regard had not been established.

On a date not shown by the record before us on this appeal, apparently during the Fall of 2006, the probation department gave notice to Agustin — at his address on record with the department — to appear in the trial court on November 3, 2006. The record

before us on Agustin's current appeal does not contain a copy of the notice to appear which the probation department sent to Agustin, and the content of the department's notice is not otherwise shown by the record. The record does suggest that the probation department had difficulty contacting Agustin at his last known address prior to the time it sent him the notice to appear.

Agustin did not appear in the trial court on November 3, 2006. In his absence, the People filed a probation officer's report which stated that Agustin had last reported to the probation department on July 12, 2005, and had been arrested by "United States immigration" on July 26, *2006*. The same report included copies of print-outs from an undisclosed source which indicated that Agustin had been taken into custody by Bureau of Immigration and Customs officials July 26, *2005*,[1] and released on August 10, 2006. The trial court summarily revoked Agustin's probation, and issued a bench warrant.

A little more than one year later (November 20, 2007), Agustin was arrested in Los Angeles County. On November 26, 2007, the trial court ordered Agustin's probation to remain revoked, and set a probation violation hearing for January 24, 2008.

On January 24, 2008, Agustin's public defender opened the probation violation hearing by advising the trial court that Agustin would be "asking for leniency." Counsel then explained that Agustin had "done three days in CALTRANS," and that he "had been reporting [to the probation department] up until the time he was deported."[2] The court

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[1] Thus, the report effectively contradicted itself as to the year of appellant's immigration arrest. As mentioned below, the probation officer later testified the file indicated a previous probation officer had checked with "immigration authorities" and been told the arrest took place in 2006. Questioning by the court repeated the 2006 date, as we will discuss below.

[2] The trial court, prosecutor, defense counsel, and probation department officials all made references and/or allusions to the fact that Agustin had been deported and then re-entered the country on dates that no one knew. Interestingly, we do not see any *evidence* in the record tending to establish that Agustin was, in fact, ever deported. Documents attached to his November 2005 motion to withdraw his plea indicated he had Lawful

declined to reinstate probation based on counsel's representations, and went forward with the probation violation hearing. Agustin's probation officer, Richard Harvor, then took the stand and testified that the probation department's records showed the following:

(1) Agustin last reported to the department on July 12, 2005;

(2) There was "no mention" in the department's records that Agustin had performed 20 hours of CALTRANS work;

(3) Agustin had given an address to the probation department before his "desertion," but "evidently it was no good;"[3]

(4) The probation file reflected Agustin's arrest by immigration authorities took place on July 26, 2006; and

(4) Agustin had not provided the probation department with an up-to-date address at any time between July 12, 2005 and November 3, 2006, when the violation report was filed.

Neither side called any further witnesses at the hearing. The prosecutor argued that Agustin's probation should be revoked because he had failed to perform his CALTRANS work. Agustin's counsel argued that Agustin's failure to perform his CALTRANS work was a "de minimis" matter, and that his failure to provide an address to the probation department after July 2005 was excusable because he had been deported during much of that time.[4] After listening to argument, the court found that Agustin had

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Permanent Resident status, but was in custody and undergoing deportation proceedings as of November 2005.

[3] If we understand the probation officer's testimony correctly, Agustin had provided an address to the probation department while he had been reporting, i.e., up to July 2005. Later, when the department used Agustin's last known address during efforts to contact him in November 2006, to notify him to appear in the trial court, that address was no longer good. After July 2005, Agustin provided no information to the department regarding his address.

[4] Defense counsel did not draw the court's attention to the fact that appellant may have been in federal custody starting in July 2005 rather than a year later.

violated his probation by "failing to keep the probation department advised of his work and home addresses and telephone numbers at all times, including during the period of July 12th, 2005, and July 26, 2006." The court revoked Agustin's probation, denied reinstatement of probation, and ordered execution of his previously suspended sentence of three years in state prison.

DISCUSSION

I.

Agustin contends the trial court's decision to revoke his probation based upon a finding that he failed to provide up-to-date address information to his probation officer must be reversed because it is infected with "due process" error. Put more specifically, Agustin essentially contends the original probation violation report which was prepared in November 2006 constituted the accusatory pleading against him, and that the report alleged only that he had failed to report after July 2005, and that this means that any other basis used for revoking probation was prohibited. We disagree.

Although due process requires that the People give a defendant notice of a claimed probation violation, the less formal nature of probation violation proceedings allows some measure of flexibility in affording due process safeguards. A strict set of procedural rules is not mandated. (*People v. Vickers* (1972) 8 Cal.3d 451, 458; *People v. Felix* (1986) 178 Cal.App.3d 1168, 1172.)

Here, Agustin received advance notice of the probation violation hearing date. He had a lawyer at the hearing. He was given an opportunity to call witnesses at the hearing, but declined. He was given an opportunity to argue against the revocation of his probation, which he did. Insofar as precise written notice regarding the issue of up-to-date address information is concerned, the record shows that, when the issue presented itself during the probation violation hearing, Agustin did not object on the ground of lack of notice.

Although Agustin's cited cases support the general proposition of entitlement to notice, they do not support a due process reversal on the present facts.

In *People v. Buford* (1974) 42 Cal.App.3d 975, the Court of Appeal ruled that a defendant could *not* claim a denial of due process on appeal because he had not sought a continuance or additional time in the trial court to prepare when a probation violation claim was added to the proceeding. (*Id*. at p. 982.)

In *People v. Mosley* (1988) 198 Cal.App.3d 1167, the Court of Appeal found a denial of due process where a charged probation violation was based solely on a new rape charge. The violation hearing was heard simultaneously with the jury trial on the new charge, and included evidence that Mosley had consumed alcohol in violation of an "abstain" term. After the jury acquitted, the court found Mosley in violation of probation based on the trial evidence that he had consumed alcohol. The Court of Appeal reversed, noting that "[t]he evidentiary phase of the hearing was completed before either [defendant] or the court was aware of the charge which ultimately constituted the basis for revocation [and defendant] had no opportunity to prepare and defend against [the] allegation." (*Id*. at p. 1174.)

No such fundamental surprise was sprung on Agustin. He knew from the November 3, 2006 probation report that he had been charged with failing to report after July 12, 2005. He was found in violation after a hearing which focused on the closely related issues of his failure to report and failure to inform probation of his contact information. We find no due process violation as to notice of the charged violation or the conduct of the hearing.

II.

Agustin contends that there is no evidentiary basis for the trial court's decision to revoke his probation for failing to provide the probation department with an up-to-date address between July 12, 2005, and July 26, 2006. We review the record for substantial evidence of a willful violation of probation. (*People v. Galvan* (2007) 155 Cal.App.4th 978, 982; *People v. Kurey* (2001) 88 Cal.App.4th 840, 848.) We are mindful that trial courts have broad discretion in determining alleged probation violations (*People v.*

Rodriguez (1990) 51 Cal.3d 437, 443), and that the preponderance of evidence standard applies to revocation hearings. (*Id.* at p. 447.)

There is a split of authority as to whether probation may be revoked where deportation makes fulfilling a term of probation impossible. (See *People v. Galvan*, *supra*, 155 Cal.App.4th at p. 985 [following deportation, failing to personally report to probation officer cannot support a violation because not willful]; cf. *People v. Campos* (1988) 198 Cal.App.3d 917, 923 [dictum: probation violation may be based on failure to report after deportation].) However, we need not weigh into that issue because the present case involves a finding of violation for failing to supply probation with current contact information, rather than failure to personally report. Keeping in mind that the present record does not establish that appellant *was* deported, we agree with respondent that appellant presumably had the means to report his whereabouts by mail or telephone, which would have satisfied the term at issue.[5] We find no abuse of discretion in the trial court's conclusion that appellant could and should have kept the probation department informed of his current address, both during any lengthy period of federal custody, and after his release, which the record indicates was in August of 2006, three months before the arrest which led to the violation proceedings.

We also reject Agustin's argument that his counsel was ineffective because he did not draw the trial court's attention to evidence suggesting that Agustin's federal custody status began in July 2005 rather than July 2006, and thus "unable" to provide an up-to-date address. For an ineffectiveness claim to succeed, there must be a reasonable probability a more favorable result would have occurred absent counsel's error. (*Strickland v. Washington* (1984) 466 U.S. 668, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 217.) We conclude that showing has not been made because, as already stated, a

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[5] The term reads: "Keep probation officer advised of your residence at all times." -(CT 5, 23.)-

period of federal custody would not have excused Agustin from his duty to inform probation of his current address at all times during his probationary period.

We also conclude the record suggests counsel may have had tactical reasons for his decisions at the hearing. (See *Strickland v. Washington*, *supra*, 466 U.S. at p. 689; *People v. Wader* (1993) 5 Cal.4th 610, 658.) Whether appellant was deported, how long he had been in federal custody and, indeed, whether appellant was a U.S. citizen as stated in his original probation report, were all matters that could have easily been addressed in testimony had there been any favorable information available. We are not inclined to assume incompetence by counsel, who came prepared with highly relevant legal authority (*People v. Galvan*, *supra*), and may have had good reasons for keeping his client off the stand or delving further into the issue of the federal custody period. Futile or meritless arguments are not a part of competent representation. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1038.)

III.

Agustin contends, the People concede, and we agree that a Penal Code section 987.8 attorney fee assessment in the amount of $1,966.74 must be vacated because no such order is reflected in the sentencing transcript, and because the record does not otherwise reflect that the notice and hearing required by Penal Code section 987.8 took place.

DISPOSITION

The clerk of the Superior Court is directed to prepare an amended abstract of judgment deleting the Penal Code section 987.8 attorney fee assessment in the amount of $1,966.74 and to forward a copy to appellant and to the Department of Corrections. In all other respects, the judgment is affirmed.

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O'NEILL, J.[*]

We concur:

RUBIN, Acting P. J.

FLIER, J.

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[*] Judge of the Ventura County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.